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In the
Supreme Court of the United States

OCTOBER TERM, 1991

CHEMICAL SPECIALTIES MANUFACTURERS ASSOCIATION, INC.
Petitioner,

vs.

CLIFFORD L. ALLENBY;
JOHN K. VAN DE KAMP, ESQ.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE COMMITTEE FOR UNIFORM REGULATION AND LABELING IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, the Committee for Uniform Regulation and Labeling respectfully submits this

amicus curiae brief in support of the granting of the Petition for Writ of Certiorari.

Amicus curiae Committee for Uniform Regulation and Labeling ("CURL") is a trade association comprised of approximately forty companies and other entities in the food industry and related industries. Within its membership are many of the largest and best known food producers in the United States, including American Home Products Corporation, Anheuser Busch Companies, Inc., Best Foods Baking Group, Campbell Soup Company, Carnation Company, The Coca-Cola Company, Gerber Products Company, H.J. Heinz Company, Hershey Foods Corporation, Thomas J. Lipton, Inc., PepsiCo, Inc., The Procter & Gamble Company and The Quaker Oats Company.

CURL is dedicated to providing the American consumer with food products that are wholesome, nutritious, safe, properly packaged and accurately labeled pursuant to the uniform standards for food labeling embodied in federal law.

CURL and its members are affected by the Ninth Circuit's decision in the instant case. Federal regulatory statutes governing the manufacture and sale of food products, like the statutes at issue in the case at bench, confer upon the federal government sole authority to determine the content of labels

and labeling. The Ninth Circuit's determination below that state-mandated point-of-sale warnings do not constitute "labeling" will impact the legal obligations of the members of CURL and threatens to undermine the vitally important federal regulatory scheme governing the national food supply.

If the Ninth Circuit's decision is allowed to stand, the various states, relying upon the similarity between the regulatory schemes at bar and those for food products, will doubtless argue that they may properly require point-of-sale warnings concerning food products. (Indeed, the State of California is already making such arguments in a pending case: *CURL v. Allenby,* United States District Court, Northern District, No. C 88 0730 EFL.) It is self-evident that public confidence in food product safety and nutrition would be jeopardized if the various states were permitted to require point-of-sale (e.g., supermarket) warnings that contradict or are inconsistent with federally-approved food labels.

SUMMARY OF ARGUMENT

The federal regulatory schemes for uniform labeling in the industries at bar (pesticides and consumer products containing hazardous substances) expressly preempt state labeling. So also do the federal regulatory schemes for meat

products and poultry products, in remarkably similar language. The federal regulatory scheme for labeling other food products preempts state nutritional labeling. Other federal regulatory schemes impliedly or expressly preempt state labeling with respect to numerous other products. Thus, it is apparent that if the Ninth Circuit's decision restricting the definition of labeling is allowed to stand, it will affect a large segment of the nation's economy and will undermine numerous federal regulatory schemes, including, most importantly, those governing the nation's food supply.

Congress has determined that maintaining the confidence of the American people in the safety and wholesomeness of such products requires that there be uniform federal standards for labeling, which standards insure the communication of relevant information in a coherent and reliable fashion. The intent of Congress would be frustrated by permitting the several states each to require the interjection of additional warnings at the point of sale. For the typical supermarket shopper, the coherent communication of reliable information pursuant to federally-approved labels on meat and poultry products, for example, might then be replaced by a cacophony of federal and state-sanctioned messages that inevitably undermine the coherence and reliability of the federally-approved labels.

In *Kordel v. United States*, 335 U.S. 345 (1948) ("*Kordel*"), this Court construed the term "labeling" to embrace unattached written material intended to communicate information to consumers about the use of the product. So also did the Second Circuit in *New York Pesticide Coalition v. Jorling*, 874 F.2d 115 (2d Cir. 1989) ("*Jorling*"). The Ninth Circuit's determination that point-of-sale warnings do not constitute labeling depends upon the proposition that such warnings are directed to mere purchasers as distinct from consumers. That proposition is plainly wrong. A shopper buying food in the supermarket is in fact a consumer and exposing the shopper to a point-of-sale warning constitutes labeling. Accordingly, *Kordel* and *Jorling* require reversal of the Ninth Circuit's decision.

ARGUMENT

A. The Ninth Circuit's Decision Impacts Not Only The Federal Regulatory Schemes At Issue Here, But Also Other Federal Regulatory Schemes That Preempt State Labeling, Including Those Governing Meat Products, Poultry Products, Food Nutrition And Other Important Products.

In the decision at bar, the Ninth Circuit held that state-mandated point-of-sale warnings are not preempted by the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §§ 136-136y (1988 and Supp. II 1990) ("FIFRA") or by the Federal Hazardous Substances Act, 15 U.S.C. §§ 1261-1277 (1988 and Supp. II 1990) ("FHSA").

FIFRA vests the United States Environmental Protection Agency with sole authority to regulate the labeling of pesticides. 7 U.S.C. § 136v(b). Labeling is broadly defined to include all "written, printed or graphic matter . . . accompanying the pesticide . . . at any time." 7 U.S.C. § 136(p)(2) (1988).

FHSA likewise vests the Consumer Product Safety Commission with authority exclusively to regulate cautionary labeling with respect to risks associated with hazardous

substances in consumer products other than the pesticides regulated pursuant to FIFRA. 15 U.S.C. § 1261 note (b)(1)(A). Like FIFRA, the FHSA defines labeling broadly, embracing "all accompanying literature where there are directions for use, written or otherwise." 15 U.S.C. § 1261(n)(2). The Commission's regulations provide that the term "accompanying literature" includes point-of-sale placards, signs or displays. 16 C.F.R. § 1500.3(c)(9) (1992).

These are not the only federal regulatory schemes that vest federal agencies with sole authority to regulate labeling and define labeling broadly. Indeed, as we demonstrate below, there are several other such schemes.

Of primary importance to CURL, and of immense importance to the American public, are the federal regulatory schemes governing the food industry. The United States Department of Agriculture comprehensively regulates meat and poultry products pursuant to the Federal Meat Inspection Act, 21 U.S.C. §§ 601-695 ("FMIA"), and the Poultry Products Inspection Act, 21 U.S.C. §§ 451-470 ("PPIA"). The Department of Agriculture conducts continuous inspections of meat and poultry slaughtering and processing operations, and regulates, reviews and requires premarket approval of the contents of all meat and poultry product labels, labeling and packaging. 21 U.S.C. §§ 457(c) and 607(d). Both of these acts

expressly prohibit the states from imposing other labeling requirements,[1] 21 U.S.C. §§ 467(e) and 678, and both define labeling broadly to include:

> all labels and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article.

21 U.S.C. §§ 453(s) and 601(p). See *Jones v. Rath Packing Co.*, 430 U.S. 519, 530-532 (1977) (Federal Meat Inspection Act preempts state labeling law).

Pursuant to the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301-394, the United States Food and Drug Administration comprehensively regulates food safety. 21

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[1] The express preemptive language in the meat and poultry acts is very similar to that in FIFRA, 7 U.S.C. § 136v(b) (1988), and FHSA, 15 U.S.C. § 1261 note (b)(1)(A). Section 678 of the FMIA provides in pertinent part: "marking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under this chapter may not be imposed by any state . . . ." 21 U.S.C. § 678. The PPIA contains identical language. 21 U.S.C. § 467(e).

U.S.C. §§ 341-350a.[2] This act employs the same broad definition of "labeling" quoted in the preceding paragraph, 21 U.S.C. § 321(m), and expressly preempts the states from imposing other nutritional labeling requirements. 21 U.S.C. § 343-1.

Federal authority over labeling extends to a number of other products besides food products and those governed by FIFRA and FHSA. The Food, Drug, and Cosmetic Act vests the Food and Drug Administration with authority over the labeling of drugs, 21 U.S.C. § 352, employs the same broad definition of labeling, 21 U.S.C. § 321(m), and preempts the states as to drug safety and efficacy labeling. See *Pharmaceutical Society of State of New York v. Lefkowitz*, 586 F.2d 953, 958 (2d Cir. 1978). The Federal Seed Act, 21 U.S.C. §§ 1551-1611, confers comparable authority with respect to seed labeling upon the Department of Agriculture and, again, defines labeling broadly. 7 U.S.C. §§ 1561(18), 1562, 1591-1601.

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[2] The Food, Drug, and Cosmetic Act prohibits commerce in food products that are adulterated, 21 U.S.C. § 331(a), and provides that a food product is adulterated if it contains a substance that renders the food injurious to health. *Id.* § 342(a)(1). The act prohibits the addition of any substance that may render a food injurious to health, 21 U.S.C. § 342(a)(2)(A), or that contains unsafe substances or levels of substance including food additives, color additives, animal drug residues, and pesticide residues. 21 U.S.C. §§ 321(s), 321(t), 342(a)(2)(B), (C) and (D), 342(c), 348, 360(b) and 376. Foods containing a chemical found to induce cancer are adulterated and prohibited under federal law. 21 U.S.C. § 348(c)(3).

Federal criminal statutes make it a felony to tamper with the labeling of any consumer product and incorporate by reference the broad definition of labeling set forth in the Food, Drug, and Cosmetic Act. 18 U.S.C. § 1365(a), (b) and (g)(2).

By its decision construing the scope of the term "labeling," the Ninth Circuit will affect the interpretation of all of these statutes. Accordingly, the decision of the Ninth Circuit is significant not only to those who are regulated by FIFRA and FHSA, but to other important sectors of the American economy as well.

B. The Ninth Circuit's Decision Jeopardizes Regulatory Schemes For Food Products By Undermining Public Confidence In The Integrity Of Federally-Approved Food Labels.

As indicated above, federal regulatory authority over the food industry is broad indeed. In conferring such broad federal authority, Congress intended to assure American consumers as to the safety, wholesomeness and integrity of the American food supply. See *Carolene Products Co. v. United States*, 323 U.S. 18, 21-25 (1944); *Federal Security Administrator v. Quaker Oats Company*, 318 U.S. 219, 230-231 (1943).

Federal control over labeling plays a central role in the regulatory process. As the Second Circuit has observed in the context of FIFRA, Congress prohibited state labeling for the purpose of "preserving the force of the information contained" in the federally-approved labels. *Jorling, supra,* 874 F.2d at 119. State-mandated communications cannot be permitted to "impair the integrity" of those labels. *Ibid.*

The decision in the case at bar, however, may be construed to support state-mandated warnings contained in labeling. This result could have its greatest impact on CURL members and other food producers through the application of California's Proposition 65, the so-called Safe Drinking Water and Toxic Enforcement Act of 1986 California Health and Safety Code §§ 25249.5-25249.13.

Proposition 65 impairs the integrity of food labels. It establishes a competing regulatory scheme whereby the state independently establishes a list of chemicals "known to the state to cause cancer or reproductive toxicity," *id.* § 25249.6, and prohibits businesses from exposing individuals to detectable levels of any such listed chemicals without first providing state-mandated warnings. *Id.* §§ 25249.6, 25249.8, 25249.10(c), 25249.11(c). The scheme presumes that *any* detectable amount is significant. It effectively forces each business to choose either to warn (about inconsequential but detectable levels) or to bear

the burden of establishing that a given level is *not* a significant risk. Point-of-sale warnings are an approved method of performing the duty to warn. *Id.* § 25249.11(f); Cal. Code Regs. tit. 22, § 12601(b).[3]

The state-mandated warning must be in the following form: "WARNING: This product contains a chemical known to the State of California to cause . . ." either "cancer" or "birth defects or other reproductive harm," as the case may be. Cal. Code Regs. tit. 22, § 12601(b)(4)(A) and (B).

The labeling of meat and poultry products, as we have demonstrated above, is subject to exclusive federal regulation and constitutes a representation by the federal government that the labelled contents are wholesome and safe. The interjection of point-of-sale warnings, declaring ominously that a given food product contains a chemical "known to the State of California" to cause cancer or reproductive harm, obviously draws into question the reliability of the federally-approved label. The conflict could scarcely be plainer: the federal government has

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[3] Whether there is any real alternative to point-of-sale warnings is extremely doubtful. Label warnings are also approved by Proposition 65, *ibid.*, but, as indicated above, are preempted by federal law. Other warning methods fail to meet Proposition 65's requirement of "clear and reasonable" warning prior to exposure. See *Ingredient Communication Council, Inc. v. Van de Kamp*, 2 Cal.App.4th 1480, 4 Cal.Rptr.2d 216 (1992) (rejecting warning system on basis of failure to include in-store product-specific warnings).

determined the food product at issue to be safe, but the state thinks otherwise.[4]

Moreover, if the Ninth Circuit's decision that Proposition 65 point-of-sale warnings do not constitute labeling is allowed to stand, the states would be encouraged to mandate other point-of-sale warnings that further undermine the integrity of federally-approved food labels.[5]

For the typical supermarket customer, the result of permitting state-mandated point-of-sale warnings would be to replace the coherent communication of reliable information pursuant to federally-approved labels with a cacophony of federal and state-sanctioned messages that inevitably undermine the coherence and reliability of the federal labels.

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[4] The point-of-sale warnings required by Proposition 65, in addition to conflicting with federal labels, are arguably misleading. The required warning -- that the product in question is "known to the State of California" to cause cancer or reproductive harm -- conveys the impression that the product has in fact caused such harm to consumers, when in fact, proof of actual harm to consumers is not necessary to trigger the warning requirement. See Cal. Health and Safety Code § 25249.10(c) and Cal. Code Regs. tit. 22, §§ 12701 et seq. (determinations of no significant cancer risk) and §§ 12801 et seq. (determinations of no observable reproductive toxicity effect).

[5] Proposition 65-type legislative proposals are pending in Illinois (HB 3795) and Massachusetts (HB 612), and a Proposition 65-type initiative has qualified for the November 1992 statewide ballot in Ohio. If any of these measures become law, a regulatory crazy-quilt will result.

As applied to food products, state-mandated point-of-sale warnings thus frustrate the intent of Congress to preserve "the force of the information contained in the [federal] label," *Jorling, supra,* 874 F.2d at 119.

C. The Ninth Circuit's Determination That Point-Of-Sale Warnings Are Not Directed To Consumers Is Plainly Wrong As Applied To The Sale Of Food, And Places The Ninth Circuit In Conflict With Decisions Of This Court And The Second Circuit.

In *Kordel, supra,* this Court held that supplemental literature provided by a drug manufacturer constituted labeling because it advised the consumer on how to use the drug. 335

U.S. at 348.[6] In an effort to distinguish the case at bar from *Kordel*, the Ninth Circuit asserted that the point-of-sale warnings mandated by Proposition 65 are not aimed at the "ultimate user" but at the "purchaser." Pet. App. at 12a.

This assertion makes no sense whatever, particularly as applied to food products (which are quite clearly included within Proposition 65's broad reach). Supermarket shoppers are obviously consumers as well as purchasers of food. And it is equally obvious that the point-of-sale warnings envisioned by Proposition 65 are intended to impart information to those consumers about the proper use of the food they purchase: namely, that foods "known to the State of California" to cause

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[6] In the companion case of *United States v. Urbuteit*, 335 U.S. 355 (1948), this Court considered the fact that leaflets were shipped separately from the products they described to be "immaterial where the advertising matter that was sent was designed to serve and did in fact serve the purposes of labeling." *Id.* at 357.

Kordel and *Urbuteit* were, respectively, a criminal action against an individual and a civil action seeking seizure of electronic machines claiming to aid in the diagnosis and cure of cancer, diabetes, tuberculosis, arthritis and paralysis. These cases demonstrate that the Ninth Circuit's restrictive definition of labeling not only enlarges the power of states to interfere with federal regulatory schemes, but also enlarges the opportunities of others to evade those schemes. Conversely, this restrictive definition limits the exercise of regulatory authority by numerous federal agencies. It is imperative that a proper and expansive definition of "labeling" be maintained to effectuate the full extent of federal regulation mandated by Congress.

cancer or reproductive harm should be consumed with caution or not at all.

This Court in *Kordel* and the Second Circuit in *Jorling* both counselled that a practical examination must be conducted into the relationship between the federal label and the other communication at issue; if the latter is aimed at the consumer and will impair the integrity of the federal label, it constitutes preempted labeling. Proposition 65's point-of-sale warnings fail on both counts. Apparently recognizing that it has no power to require cancer or reproductive toxicity warnings to be included on federally-approved product labels, the State of California seeks to circumvent federal preemption by use of point-of-sale warnings. The Ninth Circuit's narrow and unrealistic view that such point-of-sale warnings do not constitute labeling is at odds with both *Kordel* and *Jorling* and should be reversed.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

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